No. 77-19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

ARMISTEAD B. ROOD, *Petitioner,*

v.

TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS THE TRUSTEES OF THE PROPERTY OF THE PENN CENTRAL TRANSPORTATION COMPANY IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND RULES:

MISCELLANEOUS:

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STATEMENT

The Boston and Providence Railroad Corporation ("B&P") entered reorganization in 1938. After considerable litigation, a Plan of Reorganization was finally approved.[1] Under the Plan, The New York,

[1] Various orders and opinions of the reorganization court and the court of appeals are reported at 260 F. Supp. 415 (D. Mass. 1966); 413 F.2d 137 (1st Cir. 1969); 428 F.2d 159 (1st Cir. 1970); 435 F.2d 825 (1st Cir. 1970); 501 F.2d 545 (1st Cir. 1974).

New Haven & Hartford Railroad Company ("New Haven") was to acquire the assets of the B&P but leave in the custody of the B&P Trustee a fund to be used for payment of various taxes and other expenses, including fees and expenses of attorneys and others in connection with the working out of the Plan, as provided in Section 77(c) of the Bankruptcy Act, 11 U.S.C. § 205(c).[2]

Respondents the Penn Central Trustees, as successors to the New Haven,[3] acquired the assets of the B&P pursuant to the Plan of Reorganization on April 20, 1971. Thereafter, the district court invited petitions seeking compensation out of the expense fund for services rendered from July 1, 1966, through June 30, 1971. Interim payments had previously been made to cover services performed before July 1, 1966. Several petitions were duly filed and referred to the Interstate Commerce Commission for hearing; Section 77(c)(12) of the Bankruptcy Act then provided that awards of compensation made by the district court could not exceed amounts found to be reasonable by the ICC after a hearing directed to that issue.

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[2] Because the B&P assets included valuable real estate which might be sold for a nonrailroad use, an arrangement was made that would enable stockholders of the B&P to receive for several years the net cash proceeds from real estate sales of a specified nature occurring after consummation of the Plan of Reorganization. (Petitioner erroneously refers to this arrangement as "Stage Two" of the Reorganization. (Pet. at p. 6.) In fact, the real estate transactions were expected to occur, and did occur, after the Plan of Reorganization had been consummated.)

[3] *See* Pennsylvania R.R.—Merger—New York Central R.R., 334 I.C.C. 25 (1968); Boston & Providence Railroad Corp.—Reorganization, Finance Docket No. 12131—Pennsylvania R.R. Securities & Assumption of Obligations, Finance Docket No. 24361, served April 13, 1971.

One of the attorneys who sought compensation from the expense fund was Mr. Rood, petitioner in this Court. He claimed approximately $150,000 for his services as chief counsel and "technical adviser" to a small group of stockholders, called the Boston & Providence Railroad Development Group, who volunteered their views and arguments at various points during the reorganization proceeding. (The Development Group was not the official representative of the B&P stockholders pursuant to Section 77(p) of the Bankruptcy Act.) An extensive record developed at the ICC showed, among other things, that Mr. Rood and the Development Group, although they had at one time been helpful and effective on some important matters, had thereafter been responsible for fruitless litigation that substantially delayed the approval of a final Plan of Reorganization and caused attorneys representing other parties (such as the official stockholders' committee) to spend hundreds, if not thousands, of hours of time that was of no benefit to the bankruptcy estate and yet had to be compensated out of the estate. Petitioner's efforts included several petitions for rehearing or reconsideration, frequent requests for extension of time to file briefs, records and motions, and three unsuccessful petitions for certiorari previously submitted to this Court.[4] (See the chron-

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[4] Petitioner has unsuccessfully challenged several prior actions of the court of appeals and has otherwise sought relief in this Court in the following instances:

1. Petitions for mandamus and certiorari challenging the court of appeals' dismissal of the district court's affirmance of the B&P Plan were denied December 4, 1967. 389 U.S. 974.
2. Petition for certiorari challenging the court of appeals' affirmance of the district court's confirmation of the B&P Plan was denied March 16, 1970. 397 U.S. 979. Petition for

ology of the B&P Reorganization activity *after* the ICC approved the B&P Plan of Reorganization, 327 I.C.C. 10 (1966), in Appendix B of the ICC hearing examiner's Report and Order, Boston & Providence Railroad Corporation Reorganization (Compensation and Expenses), Finance Docket No. 12131, served August 24, 1972.)

The ICC affirmed the Report and Order of the hearing examiner insofar as it determined that petitioner Rood was entitled to no compensation for his activities during the 1966-71 period,[5] and the ICC also added this comment about his activities:

> ". . . Mr. Rood's efforts have been directed at modifying or challenging the plan before every possible tribunal. This effort has not yielded any modification of the plan and has had the effect of adding substantial costs of litigation to the estate's burden." 342 I.C.C. 859, 871 (1974).

The ICC's Report on compensation was duly filed in the district court, which then issued an Order setting the matter for hearing. In its Order, the district court listed by name only those persons the ICC had recommended receive compensation; the list did not include those for whom no compensation was recommended, including petitioner Rood. The Development

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rehearing of denial of petition for certiorari was denied April 27, 1970. 397 U.S. 1071.

3. Petition for certiorari challenging the court of appeals' affirmance of the district court's order authorizing consummation of the B&P Plan was denied May 17, 1971. 402 U.S. 989. Petition for rehearing of denial of petition for certiorari was denied June 21, 1971. 403 U.S. 940.

[5] Mr. Rood had received an award of compensation for his efforts prior to July 1, 1966.

Group was included, because the ICC had recommended that the Group receive reimbursement for certain expenses it had incurred. Also listed in the Order was the firm of Palmer & Dodge, which had represented the Development Group and petitioner Rood at various stages of the prior proceedings.

Memoranda were filed by various parties, a hearing was held, and in due course the district court, on September 3, 1974, entered orders awarding compensation in accordance with the ICC recommendations. Petitioner Rood took no action to request that the district court enter an order relating to his own petition for compensation.

The reorganization proceedings remained in this posture for over a year. In February 1976, the Penn Central Trustees filed a petition in the district court seeking a final turnover to them of the balance remaining in the B&P expense fund. The petition alleged that all payments from the fund required by the district court's orders of September 3, 1974, had previously been made and that no further claims against the fund could be made. After various parties filed memoranda, the district court held a hearing on the turnover petition on May 3, 1974. Three attorneys for the Development Group interests appeared at the hearing; petitioner Rood was one of them. They argued that Mr. Rood, who claimed compensation for work done *after* June 30, 1971, should still be entitled to file a claim; the Penn Central Trustees opposed this.[6] Not

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[6] The Penn Central Trustees took the position that no compensation for efforts that post-dated the April 20, 1971, consummation of the Plan of Reorganization could be awarded out of the expense fund, inasmuch as the fund had been established to com-

a word was said in that hearing by any of the three Development Group attorneys about the failure of the district court to enter an order on Mr. Rood's claim for compensation for the 1966-71 period, although the point had been mentioned obliquely in memoranda filed in the district court.

The district court granted the turnover petition. (Pet. at p. 1a.) Various parties (including petitioner Rood) appealed, and the Penn Central Trustees, acting pursuant to Rule 12 of the Rules of the First Circuit, moved for summary affirmance. The appellants, including petitioner Rood, filed memoranda in response to the motion, and on November 5, 1976—some thirty-eight years after the B&P went into reorganization—the court of appeals granted the motion for summary affirmance of the turnover order. (Pet. at pp. 2a-3a.)

Petitioner Rood moved for rehearing of this order. In large part, this effort was successful, because the court of appeals acknowledged what it deemed an error in its earlier order; it ruled that parties could indeed file claims for compensation for services rendered on and after July 1, 1971. (Pet. at pp. 5a-6a.) The court thus remanded the case to the district court for further proceedings on that point.[7] The court of appeals ruled against petitioner Rood on his contention that his claim for compensation for the 1966-71 period was still open because of the failure of the

pensate for work done in connection with the "working out" of that Plan of Reorganization. *See* 342 I.C.C. at 868; 413 F.2d at 140; 501 F.2d at 547-48.

[7] Although the remand order was entered January 17, 1977, petitioner Rood has not yet presented any claim to the district court.

district court to enter a separate order to implement the recommendation of the ICC that no compensation be awarded to him. Several further efforts to have the court reconsider this point proved unsuccessful. (Pet. at pp. 7a-9a.) The court relied both on its rules relating to petitions for rehearing and on its view that in any case no injustice had been done in dismissing petitioner's appeal on this point.

REASONS FOR DENYING THE WRIT

1. The Court has no jurisdiction to consider this case.

Petitioner timely requested and obtained an extension of time to June 16, 1977, in which to file his petition. An application for a further extension would have been due June 6, because Rule 34(2) requires that an application to extend the time to file a petition for certiorari be filed at least ten days before the petition would otherwise be due, unless the petitioner shows extraordinary circumstances requiring that it be filed within the last ten days. Petitioner did not file his application to further extend the time to file his petition until June 16.[8] Petitioner's application on its face shows no extraordinary circumstances to justify a delay in filing his petition. As the record shows, petitioner is an experienced litigator whose delay should not lightly be excused.

The application for further extension of time having been untimely filed, the petition is out of time and the Court lacks jurisdiction.

[8] Mr. Justice Brennan granted the extension requested on June 16 but without prejudice to the Court's consideration of whether the application was timely. (Pet. at p. 10a.)

2. In any event, as a reading of the questions presented by the petition for certiorari demonstrates,[9] the issues raised by petitioner do not warrant this Court's attention. The aspect of Section 77(c) of the bankruptcy statute which controlled the district court's critical 1974 action has now been superseded by section 618(b) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 117; therefore, a decision by this Court relating to Section 77(c) before it was superseded would be of no importance to other litigants. Moreover, petitioner has not shown that the court of appeals has abused its summary disposition procedure, warranting the exercise of this Court's supervisory powers.

The court of appeals correctly ruled that petitioner Rood no longer had a claim for expenses incurred prior to July 1, 1971. Under Section 77(c) of the bankruptcy statute, as it existed in 1974, the ICC established maximum limits of compensation for expenses incurred in the working out of the reorganization plan. The recent amendment to Section 77(c) has eliminated the ICC from this process, and thus the current procedures are entirely different from what they were in 1974.[10] At that time, however, the district court

[9] That is, if one can understand them. Indeed, not only are some of petitioner's questions virtually incomprehensible but the preamble to them contains a misstatement of fact. It is simply not true that petitioner's allegedly pending claims have "by agreement" been held in abeyance in the district court since 1974.

[10] Judge Anderson, sitting by designation in the New Haven reorganization proceedings, has held that the 1976 amendment terminated all of the ICC's powers and duties under Section 77. He ruled, therefore, that the ICC had no authority to establish maximum limits of compensation in the New Haven proceeding, even for expenses incurred prior to the effective date of that amendment. *See In re* The New York, N.H. & H.R.R., 421 F. Supp. 249, 252 (D. Conn. 1976), *aff'd*, 76-5025 (2d Cir. Mar. 18, 1977).

could award compensation only up to the limits established by the ICC. Its orders entered in September 1974 did exactly that. The ICC having denied Mr. Rood's claims in full, the district court had no discretion to enter an order awarding him compensation. All other parties to the reorganization considered the September 1974 orders to be the final disposition of all claims for expenses incurred between 1966 and 1971. For this reason the Penn Central Trustees filed their turnover petition in 1976.

It was petitioner Rood, not the court of appeals, who then trapped himself by failing to argue the alleged pendency of his claim for 1966-71 expenses in the district court. The Penn Central Trustees, in their turnover petition and at a hearing in which petitioner Rood participated, made two arguments: (1) the district court's orders in September 1974 were the final disposition of all claims for expenses incurred prior to July 1, 1971; and (2) no expenses incurred on or after July 1, 1971, were compensable from the debtor's expense fund. Petitioner Rood responded to the second contention, but did not raise any objection to the first point at the hearing in the district court. The district court ruled in favor of the position of the Penn Central Trustees, and the court of appeals affirmed. (Pet. at pp. 1a-3a.)

The critical order of the court of appeals was the order entered February 2, 1977. (Pet. at p. 7a.) Following normal appellate practice, the court of appeals

there declined to accept Mr. Rood's contention, in two motions for rehearing, that the district court's orders in September 1974 had not adjudicated his claim for compensation for the 1966-71 period. As the court said, "no satisfactory explanation [was] proffered" for the belated raising of what was claimed to be a vital point.

No satisfactory explanation was indeed proffered. Petitioner Rood contended that he had not anticipated the court of appeals' ruling that the September 1974 orders of the district court finally adjudicated all 1966-71 claims. But that is no explanation at all. As set forth above, the Penn Central Trustees made it perfectly clear—in their turnover petition, in the hearing thereon in the district court, and in their motion for summary affirmance in the court of appeals—that one of the necessary prerequisites to the turnover of the B&P expense fund was that all claims against the fund for services performed prior to the closing in 1971 had been finally adjudicated. It is difficult indeed to see how a litigant could have failed to grasp the importance of that point. That he did fail to grasp it, or that he simply neglected to address the point in a timely fashion—either in the district court or in the court of appeals—was, as the court of appeals correctly held, an insufficient explanation for his failure to raise the point until his petition for rehearing in that court.

Of course, the court of appeals is not so wedded to rules of procedure that it will allow them to work a manifest injustice. For in its order of February 24, 1977 (Pet. at 8a), the court made explicit what was surely implicit in its earlier order, namely, that it had reviewed the merits of the claim belatedly put forth

by petitioner Rood and had found "no good reason" to depart from its rules of practice. The reason is simple. Under the statute, before its amendment in 1976, the district court's power was circumscribed by the recommendation of the ICC; inasmuch as the ICC recommended that no compensation be awarded to petitioner Rood, the district court in 1974 had no discretion to make any award to him. *At no time did Mr. Rood explain to the court of appeals how the district court could have acted favorably on his petition for compensation.*

The court of appeals might well have concluded that petitioner, lacking any substance to his underlying claim, was simply casting about for colorable technical errors in an effort to prolong an aspect of the B&P reorganization proceedings, as he has done many times before.[11] Where a court of appeals has acknowledged an error in its original order and has remanded the case to the district court in order to permit a litigant to present a claim, it comes with ill grace for that same litigant to accuse that same court of appeals of abusing its procedures and setting "trap doors" which allegedly deny the litigant an opportunity to make just one more argument.

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[11] See pp. 3-4 and n. 4, *supra*. In an earlier decision relating to Mr. Rood's institution of vexatious litigation in connection with the B&P reorganization, the court of appeals stated that it was "all too aware of the harvest of exacerbation which hoary litigation reaps." 501 F.2d at 549.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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